United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLEE
DISTRICT UNEMPLOYMENT COMPENSATION BOARD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23078-79
23151-53

NATIONAL GEOGRAPHIC SOCIETY, *Appellant*

v.

DISTRICT UNEMPLOMENT COMPENSATION BOARD and LUCY ARLENE THOMAS (No. 23078); LAURA H. DORSEY (No. 23079); MARGARET C. SMITH (No. 23151); DOROTHY PYATT (No. 23152); DORIS M. GILES (No. 23153), *Appellees*

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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*Cases and Statutes chiefly relied on.

NOTE: All underlined statements appearing in brief have been added for emphasis only.

REFERENCES TO RULINGS

STATEMENT OF QUESTION PRESENTED

1. In the opinion of the appellee, the District Unemployment Compensation Board, the sole question before the court is whether the findings of fact by the Board that the individual employees had good cause for resigning and were in fact available for work is supported by the evidence.

2. Whether Section 11(f) of the District of Columbia Unemployment Compensation Act, D.C.Code, Title 46 311 (f) (1967) is satisfied when the Board's decision is based solely on the record and no new evidence is presented.

These consolidated cases have never been previously before this court under the same or similar titles.

COUNTER STATEMENT OF THE CASE

Appellees herein are all former employees of appellant, National Geographic Society. The appellant moved a large portion of its facilities to a location near Gaithersburg, Maryland, approximately 19 miles from downtown Washington, District of Columbia. There is no public transportation available to appellant's new location. Four of the appellees, Laura Dorsey, Margaret Smith, Dorothy Pyatt and Doris Giles, submitted their resignations to appellant and thereafter applied for unemployment compensation. The other appellee, Lucy Thomas, was ill when appellant moved its facilities and when she was able to return to work appellant offered her a job at its new location. This appellee refused to go that distance to work and she also applied for unemployment compensation. Each of the appellees were granted unemployment compensation and appellant appealed their awards. A hearing was held before the District Unemployment Compensation Board and the Board found that appellees were justified in quitting their employment at appellant's new location and were available for work as required by Sections 9(d) and 10(a) of the Act. (JA -20). Appellant hereinafter petitioned the U.S.District Court for review. After a hearing, the Court found that the findings of the Board were supported by the evidence and affirmed the decisions of the Board. It is from these decisions that this appeal is taken. (JA 15-19). (Title 46, 309(d) D.C. Code

(1967), Title 46, 310 (a), D.C. Code (1967).

ARGUMENT

All the appellees in the consolidated cases before this court except one[1/] experienced the same difficulty with their respective employment at National Geographic Society in that each voluntarily quit her job when the Society moved its offices from 3rd and R Streets, N. E., in the City of Washington to a new location five miles north and west of Rockville, Maryland. This is a distance of approximately 19 physical miles from its former location in the city. There is no public transportation to the new location.[1a/]

1/ Lucy Thomas resigned prior to the move due to illness. Each employee will be referred to by name and appeal number.

1a/ In any appeal under this section the findings of the Board, or of the examiner or appeal tribunal, as the case may be, as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. (Emphasis added). (Title 46, 312(a) D.C. Code (1967)).

The findings of fact made by the Board of Review, based upon competent testimony, are binding upon us. The credibility of the witnesses, the weight of their testimony, and the reasonable inferences to that drawn therefrom are for the board as to ultimate finders of fact. (Allison v. Bd. of Rev. 193, Pa. Super, 370, 165 A 2d 125 (1960))

Our duty is performed by examining the testimony in the light most favorable to the party in whose favor the Board has found, giving that party the benefit of every inference which can be logically and reasonably drawn

LUCY THOMAS-APPEAL NUMBER 23078

In the Lucy Thomas case the Appeals Examiner found that Thomas resigned her job from the National Geographic Society due to illness and when she was physically able to return to work the Society offered her re-employment at its new location in Maryland approximately 19 miles from the District of Columbia. Thomas refused this offer of employment. (JA-24)

The appellant alleges that Thomas did not have good cause for refusing this employment and, therefore, was not available for work. The Board's determination of this issue is that the work, which was offered to Thomas by her former employer, was not suitable because of the distance to and from work. Her failure to accept this work, therefore, does not make her unavailable and her testimony at the hearing satisfactorily establishes her availability.[2/] (JA -2).

1a/ (Continued)

from it. Johnson Unemployment Compensation Case, 192 Pa. Superior Ct. 283, 161 A. 2d 626 - Accord - Stillman v. Board of Review - 161 Pa Super 569 A 56 A 2d 380.

The Board will determine what is or is not good cause for failure of an otherwise eligible individual to apply for or accept suitable work. It must first be determined that the work is suitable in a particular case in accordance with the general standards prescribed. Regulation III-C of Rules and Regulations (Ja -22 C)

2/ Reviewing court has limited function where question is one of specific application of broad statutory term in proceedings in which agency administering statute must determine it initially - California vs. Udall 1961, 296 F 2d 384, 111 US app. 262.

In the case of Di Re vs. Central Live Stock Order Buying Company, 74 N.W. 2d 518-526, 246 Minnesota 279, the court stated:

> "In determining whether or not any work is suitable for an individual, the commissioner shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience, his length of unemployment and prospects of securing local work in his customary occupation and the distance of the available work from his residence."

The evidence adduced at the hearing was sufficient in character and degree to support the conclusion reached by the Board.[2/] Supra. (JA -2).

LAURA DORSEY-APPEAL NUMBER 23079

Laura Dorsey resigned her position with the National Geographic Society August 16, 1968. (JA-26) She lives at 800 52nd Street, N.E., approximately 19 city blocks from the nearest pick-up point of the chartered bus. She would have had to pay two fares. She has an asthmatic condition. She was primarily concerned about getting home during the day if she became ill or there was an emergency at home and also because of the transportation expense and the time and distance involved. In view of the testimony and evidence presented at the hearing, the Board properly concluded that Dorsey had carried the burden of proof in establishing good cause,[3/] that her testimony at the

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3/ It is not the function of a court to re-examine an administrative agency's determination of fact questions and if substantial evidence in the record supports a finding

hearing disclosed that she was attached to the labor market and she was available for work in the local labor market. (1a and 2 Supra) (JA-28) (JA-3).

MARGARET C. SMITH-APPEAL NUMBER 23151

Margaret Smith resigned from her position with the Society on September 20, 1968 when the Society moved from its local office to Rockville, Maryland. (JA-30) She lives at 448 N Street, N.W. approximately 12 city blocks from the nearest pick-up point of the Society's chartered bus stop. She would have had to pay two fares to get to work.

She has three minor children, from 3 to 12 years of age. She resigned when she was unable to get someone to care for her children prior to 7:30 in the morning and additional cost of transportation. To meet the schedule of the chartered bus she would have to leave home much earlier than 7:30 in the morning.

The testimony and the evidence adduced at the hearing be-for the Examiner, the Board had sufficient evidence, based on competent facts, to conclude that Smith had good cause for voluntarily resigning her position and her testimony showed she was attached to the labor market and she was available for work within the meaning of the Unemployment Compensation Act. (JA-34)

3/ (Continued)

of fact it may not be disturbed. Weldon Farm Products, Inc. vs. Commodity Credit Corp. D.C. 1936-214 F Supp 678.

The appellant's allegation that Smith failed to make adequate preparation for child care is without merit.[4] (1a and 2 Supra) (JA-4).

DOROTHY PYATT-APPEAL NUMBER 23152

Dorothy Pyatt voluntarily resigned from her position with the Society September 30, 1968 when the Society moved its offices from Washington to Maryland. Pyatt lives at 1812 Vernon Street, N.W. (JA-35)

She had to use public transportation to get from her home to the Society's chartered bus pick-up point. The examiner's conclusion, based on testimony and evidence adduced at the hearing that she had established good cause for leaving this employment and also that she was genuinely attached to tee labor market and was available for work.[5] (JA-38)

(1a and 2 Supra) (JA-18).

4/ Interpretation by agency charged with responsibility of administrative statute is entitled to great weight. Pangburn vs C.A.B. CA Mass 1962 - 311 F 2d 349. See also Cerrano vs. Fleishman, D.C., N.Y. 1964, 225 F Sup 761 affirmed 339 F 2d 929 - Certiarai denied 86 S Ct 106, 382 U.S. 855, 15 L Ed. 2d 93.

5/ If decision of Board of Review that applicants were eligible for unemployment compensation is supported by any evidence it must be confirmed by the Court of Appeals. Dalton Brick and Title Company vs. Huiet 115 S.E. 2d 748

Employment Security Commission's decision supported by competent material and substantial evidence and not arbitrary or capricious and not affected by error of law should have been affirmed. Beaman vs. Aynes 393 P 2d 152.

DORIS M. GILES-APPEAL NUMBER 23153

Doris Giles voluntarily resigned from her position with the appellant on August 26, 1968 when the Society moved its offices to Maryland. (JA-39) She lives at 601 Faraday Place, N. E. and she had to use public transportation to the pick-up point of the Society's chartered bus.

The Appeals Examiner concluded on the basis of the above facts that she had established good cause for leaving this employment and that her testimony at the hearing further reveals that she was attached to the labor market and available for work.[6/] (1a and 2 Supra) (JA -8)

In answer to all contentions raised by the appellant, it is submitted that the decisions of the Board are administrative decisions. In determinations made by administrative agencies the findings of fact if supported by evidence and in the absence of fraud shall be conclusive and the jurisdiction of the court is confined to question of law.[7/] This rule of

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6/ Fact finding in unemployment compensation cases is functions of Industrial Commission and not reviewing court. Cutler-Hammer, Inc. vs. Industrial Commission 109 - N.W. 2d 468.

Findings of fact are within exclusive providence of appeals board. Hughes vs. Catherwood 255 N.Y. Supp 2d 197

7/ Morrison Road Bar, Inc. Vs. Industrial Commission, 138 Colo., 16, 328 P 2d 1076 - It is axiomatic that findings of the Commission as to the facts if supported by substantial evidence shall be conclusive. A reviewing

administrative law is universal and the authorities on this point are legion. This court followed the rule in Stravakis vs. Gardner - U.S.App D.C. 22117, decided January 23, 1969 - Justice Danaher delivered the opinion of the Court.

> "The Act while authorizing limited court review provides that the "findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." We are not persuaded that error has been shown, and the judgment of the District Court is affirmed."

This court also stated in NLR vs. Capital Transit Company (1965) 221 F 2d 864 - 195 U.S. App D.C. 310, that the "findings of administrative agency are essential to facilitate judicial review by revealing factual basis but also to reflect determinations of policy or judgment which agency alone is authorized to make". (1a and 2 Supra)

A claimant has the duty of demonstrating his availability for work by showing among other things that he is in the labor market and that he has made an active search to find work. It is the responsibility of the Board to determine after proper inquiry whether a claimant has met the availability requirements.[8/] The matter then becomes an administrative determination

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7/ (Continued)

court may not interfere with an administrative judgment merely because there is a ground for difference of opinion nor may a reviewing court substitute its judgment for that of an administrative body when findings of fact are properly supported by the evidence.

8/ In Youngstown Sheet & Tube Co. vs. Review Board of Indiana Employment Security Division, 116 N.E. 2d 650, the

which is subject to judicial review only where it has been shown that such determination is unreasonable, arbitrary, and capricious. The Board's determination in these cases is supported by substantial evidence in the record and is not therefore subject to judicial review. (1a and 2 Supra)

Appellant also contends that these claimants did not have good cause for resigning their positions. To this contention the appellee relys on Bliley Electrical Company v. Unemployment Compensation Board of Review 158 PA Super 548, 45 A 2d 898, the court stated:

> "When therefore the pressure of real not imaginary, substantial, not trifling, reasonable, not whimsical, circumstances compel the deicision to leave employment, the decision is voluntary in the sense that the worker as willed it but involuntary because outward pressures have compelled it. Or to state it differently, if a worker leaves his employment when he is compelled to do so by necessitous circumstances or because of legal or family obligations, his leaving is voluntary with good cause, and under the Act he is entitled to benefits. The pressure of necessity, of legal duty, or family obligation, or

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8/ (Continued)

appellate court of Indiana in a case involving availability for work" the court in its decision said: "Upon the evidence introduced, the Board, in affirming the decision of the Referee held that the claimant was available for work and was eligible for benefits for the period involved. It is a well recognized rule of law that in matters of this kind this Court cannot disturb the decision unless reasonable men would be bound to reach a different conclusion on the evidence

On appeals in unemployment compensation cases, jurisdiction of Supreme Court is limited to review of questions of law. Boody v. Eddy Bakines, 397 P 2d 256.

See 7/ Supra

> other overpowering circumstances and his capitulation to them transform what is ostensibly voluntary unemployment to involuntary unemployment."

These consolidated cases fall within the ruling of the court in the above case. The Board found that the employees had compelling reasons to leave their work.[9/] (1a and 2 Supra)

It is further submitted that the question of whether an employee is available for work so as to be entitled to unemployment benefits is one of fact and is to be determined by the Board. The Arizona court stated in Cramer v. Employment Security Commission, 90 Arizona 350:

> "Availability is an eligibility requirement found in the unemployment compensation law of every state. It is difficult to precisely define. It must be determined from and in the light of the circumstances of each case."

It is the determination of the Board that all the conditions entitling these employees to benefits under the Act have been met.[10/] (JA 9-14).

9/ In National Furniture Manufacturing Co., Inc. vs. Review Board of Indiana Employment Security Division, 170 N. E., 2d, 381 stated: "However, since the burden is upon the claimant to show that he left with good cause we are of the opinion that the question of 'good cause' becomes a question of fact and we cannot lay down a well defined set of rules that would make the question of 'without good cause' a question of law."

See 7 Supra

10/ In Nelson vs. Van Horn Construction Company, 102 N.E. 2d 57, the court stated: Therefore it seems consistent with the Shannon Ruling to conclude that an unemployed person is 'available for suitable work and is actively seeking work' if under the circumstances of his parti

The appellant cites the Robinson case in support of his argument. (JA-9). The facts in these cases are distinguishable because Robinson's resignation was effective on September 13, 1968 one day before the appellant's move to its new location in Maryland which was subsequent to the week ending September 14, 1968. The evidence shows that Robinson who owned an automobile had no idea how far the employer's new location was from her home. She concluded without any investigation that the new duty station would be too far and would have worked a hardship on her. It was concluded, therefore, that Robinson had failed to carry the burden of establishing good cause for voluntarily leaving her employment.

In the consolidated cases each employee gave some specific and convincing reasons for leaving his employment or refusing to accept employment at the new location as more fully appears in the appellee's argument. (1a, 2 and 10 Supra). (JA 2-8).

And finally, appellant alleges that the Board failed to keep a stenographic record of the hearing before the Board. To this allegation the Board reviews the record of the proceedings at the hearing before the Appeals Examiner and makes its decision

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10/ (Continued)

cular case he has acted to relieve his unemployment in good faith and in a reasonable way."

If the Board finds that the claimant has failed without good cause to either apply for new work or to accept ~~any suitable~~ work offered to him by any employment

solely on the record. The hearing before the Board is not a hearing de novo. Therefore, this allegation of appellant is without merit.[11] (D.C. Code, 411 F)

10/ (Continued)

office***". Regulation III C of the Rules and Regulations Relating to Employers. (Emphasis Added)

See 7 Supra

11/ Under subsection 11(e) of the Act the aggrieved party may petition the Board for a reconsideration of the decision of an examiner or appeal tribunal. Such petition must be filed within ten days after the date of notification or mailing of the decision appealed from and shall state the specific grounds relied upon by the petitioner. Any petition for reconsideration based upon newly discovered evidence shall be verified under oath and shall set forth the nature of such evidence in detail, showing clearly that it is in fact newly discovered. Upon receipt of such a petition the Board shall proceed to consider all matters presented by the record and the decision and on the basis of such consideration shall then proceed to affirm, reverse or modify the prior decision or it may set same aside and order a rehearing or the taking of additional evidence before the same or a different examiner or appeal tribunal or before the Board itself. (Emphasis Added)

Decisions of purely factual considerations in unemployment compensation proceeding is primarily within providence of appeal board and hearing in common pleas court is not de novo. Adnie vs. Ford Motor Co. 195 N.E. 2d 131.

CONCLUSIONS

For these reasons stated herein the Board prays that the decision of the lower court be affirmed and that the appeals of the appellant be dismissed.

Respectfully submitted

George A. Ross